Supreme Court, U. S.
FILED
FEB 21 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1978

—o—

NO. 78-1049

—o—

ALIQUIPPA AND SOUTHERN RAILROAD COMPANY, ET AL.,

Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, ET AL.,

Respondents.

—o—

NO. 78-1069

—o—

BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

—o—

BRIEF OF RESPONDENTS BURLINGTON NORTHERN INC. AND UNION PACIFIC RAILROAD COMPANY IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

—o—

CURTISS H. BERG
WILLIAM R. POWER
Burlington Northern Inc.
176 East Fifth Street
St. Paul, Minnesota 55101

WILLIAM PAUL HIGGINS
WILLIAM DONALD BOE, JR.
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179

Attorneys for Respondents

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

INDEX

Pages

Questions Presented 1

Statement of the Case 2

Argument:

I. The Commission's Action Was An Exercise of Its Car Service and Demurrage Powers. It Did Not Prescribe Divisions of Joint Rates, and the Provisions of Section 15(6)(a) Have No Effect on the Commission's Action. 6

II. The Third Circuit Correctly Determined That § 17(14)(b), Unlike § 17(14)(a) Which Was Enacted at the Same Time, Contained No Sanction, and Moreover, That a Court-Imposed Sanction Would Not Be Equitable Or Consistent With Statutory Aims. 9

III. The Decisions of the Commission and the Court Below Allow No Rebates or Other Practices in Violation of §§ 6(7), 15(15), or 41(1) of Title 49 (now 49 U. S. C. 10761, 10747, and 11903). These Decisions Are Also Consistent With One Another and With the Decisions of This Court.... 12

Conclusion 19

CITATIONS

CASES:

Aberdeen & Rockfish R. Co. v. United States, 565 F. 2d 327 (5th Cir. 1977) 9

CITATIONS—Continued

Pages

Adequacy of Freighthouse Rentals Charged, 344 I. C. C. 157 (1973) 12

American Smelting and Refining Corp. Terminal Service, 270 I. C. C. 359 (1948) 12

A. O. Smith Corp. Terminal Allowance, 319 I. C. C. 99 (1963) 12

Car Service, Freight Cars, 268 I. C. C. 687 (1947) 2

Chicago, M. St. P. & P. Ry. Co. v. United States, 366 U. S. 745 (1960) 8

Demurrage Rules and Charges, Nationwide, 340 I. C. C. 83 (1971), aff'd sub nom, General Mills v. United States, 364 F. Supp. 1178 (D. Minn. 1973) 3, 16

Ford Motor Co. Terminal Allowance, 310 I. C. C. 297 (1960) 12

Forwarder Rates Conditioned Upon Aggregates of Tonnage, 264 I. C. C. 225 (1945) 12

Grain By Rent-A-Train, IFA Territory to Gulf Ports, 355 I. C. C. 11 (1969) 12

I. C. C. v. Oregon Pacific Industries, Inc., 420 U. S. 184 (1974) 6

Increased Demurrage Charges, 1956, 300 I. C. C. 577 (1957) 16

Iversen v. United States, 63 F. Supp. 1001, aff'd per curiam 327 U. S. 767 (1945) 7, 15

CITATIONS—Continued

Pages

Kidston & Co. v. D. L. & W. R. Co., 74 I. C. C. 135 (1922) 16

Milk Transport, Inc. v. Interstate Commerce Commission, 190 F. Supp. 350 (1960), aff'd per curiam 368 U. S. 5 (1961) 17

Propriety of Operating Practices—N. Y. Warehousing, 216 I. C. C. 291 (1936) 12

Remittance of Demurrage Charges by Common Carriers of Property by Rail, 353 I. C. C. 567 (1977) 2, 3

SEC v. Chenery Corp., 318 U. S. 80 (1943) 18

SEC v. Chenery Corp., 332 U. S. 194 (1947) 16, 17, 18

South Buffalo Ry. Terminal Service, 287 I. C. C. 195 (1952) 12

Turner Lumber Co. v. Chicago, M. & St. P. R. Co., 271 U. S. 259 (1926) 3

Union Tank Car Co. Terminal Service, 268 I. C. C. 338 (1947) 12

Utah Gilsonite Co. v. A. T. & S. F. Ry. Co., 96 I. C. C. 653 (1925) 16

STATUTES:

Act of February 5, 1976, 90 Stat. 31 (Railroad Revitalization and Regulatory Reform Act of 1976) 7, 8, 10, 11

CITATIONS—Continued

Pages

Administrative Procedure Act

Section 553, 5 U. S. C. 553 10

Section 706(2)(A), 5 U. S. C. 706 5

Interstate Commerce Act

Section 1(6), now 49 U. S. C. 10750 ..... 5, 7, 8, 11, 16

Section 1(11), now 49 U. S. C. 11121 7

Section 1(14)(a), now 49 U. S. C. 11122 7

Section 1(15), now 49 U. S. C. 11123 ..... 6, 7

Section 6(7), now 49 U. S. C. 10761 ..... 2, 12, 18

Section 15(6)(a), now 49 U. S. C. 10705 ..... 1, 6, 8, 9

Section 15(15), now 49 U. S. C. 10747 ..... 2, 6, 12, 15, 18

Section 15(15)(a), now 49 U. S. C. 10747 2

Section 17(14)(a), now 49 U. S. C. 11701(c) 9, 10

Section 17(14)(b) 1, 9, 10, 11

Elkins Act

Section 1, 49 U. S. C. 41(1), now 49 U. S. C. 11903 ..... 2, 6, 12, 18

Regulations

Part 1300, 49 C. F. R. Part 1300 (1977) 13

Page 18797, 40 F. R. 18797 (April 30, 1975) 4, 9

In The

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1049

ALIQUIPPA AND SOUTHERN RAILROAD COMPANY, ET AL.,
Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, ET AL.,
Respondents.

NO. 78-1069

BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents.

BRIEF OF RESPONDENTS BURLINGTON NORTHERN INC. AND UNION PACIFIC RAILROAD COMPANY IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Whether the Commission's demurrage remittance rule is a division of joint rates requiring it to follow the procedures and standards of former § 15 (6) (a) of the Interstate Commerce Act (now 49 U. S. C. 10705 (b) and (e))?

2. Whether the Commission's order is invalid under former § 17 (14) (b) of the Interstate Commerce Act?

3. Whether the Commission's own order permits unlawful rebates contrary to the provisions of former §§ 6 (7) and 15 (15) (a) of the Interstate Commerce Act (now 49 U. S. C. 10761 and 10747) and former § 41 (1) of the Elkins Act (now 49 U. S. C. 11903)?

STATEMENT OF THE CASE

Petitioners here have sought review of a Third Circuit decision, 583 F. 2d 678 (1978), unanimously affirming the Interstate Commerce Commission decision in Ex Parte No. 289, *Remittance of Demurrage Charges by Common Carriers of Property by Rail,* 353 I. C. C. 567 (1977).

The Commission instituted Ex Parte 289 as part of its continuing effort to deal with freight car shortages which have plagued American railroads and rail shippers for at least two decades. As early as 1947, the Commission had recognized the inadequacy of the Nation's rail car fleet. *Car Service, Freight Cars,* 268 I. C. C. 687 (1947). During the past few years, the Commission has undertaken a number of major efforts to ease the car shortages — adopting various rules to regulate freight car placement and movement; establishing a uniform schedule of "per diem" charges, the rents paid by one railroad for the use of another railroad's cars; adding an incentive element to basic per diem charges; and imposing various increases, both temporary and permanent, in demurrage charges. Ex Parte 289 was one of many proceedings aimed at increasing the rail car fleet and obtaining better utilization from the existing car fleet.

Historically, demurrage, which is the charge imposed on shippers and receivers for the detention of freight cars beyond the alloted free time period for loading and unloading, has played an essential role in encouraging efficient car utilization.

Demurrage charge have a double purpose. One is to secure compensation for the use of the car and of the track which it occupies. The other is to promote car efficiency by providing a deterrent against undue detention. Demurrage is not a revenue measure. *Turner Lumber Co. v. C., M. & St. P. Ry.,* 271 U. S. 259, 262 (1925).

In 1971, the Commission authorized substantial increases in demurrage charges because existing charges were no longer adequate to encourage prompt release of cars and make them available for the movement of goods. That proceeding allowed demurrage charges in increments of $10, $20 and $30, per car per day, depending on the length of the detention period. *Demurrage Rules and Charges, Nationwide,* 340 I. C. C. 83 (1971).[1] As a result of these as well as earlier increases in demurrage charges, the penalty element of the demurrage charge became significantly greater than the other element, which compensates the collecting railroad for per diem paid the car owner and other related expenses.

With this background, the Commission decided in October, 1972 to institute Ex Parte No. 289, *Remittance of Demurrage Charges by Common Carriers of Property by Rail,* to determine whether remittance of the penalty portion of the demurrage charge to the owning line (while allowing a collecting line to retain adequate compensation to cover its per diem, use of tracks, administrative expenses, *etc.*) would create an added incentive for the railroad car owner to acquire additional cars and remove

1 On January 31, 1979, the Commission authorized further increases in demurrage charges. Effective February 1, 1979, the charges increased to $20, $30 and $60, per car day, depending on the length of the detention period.

any incentive of the nonowner railroad to encourage detention of foreign cars to benefit from collection of demurrage charges. Following appropriate Federal Register publication, interested parties participated in the Commission proceeding by submitting written initial and reply statements of fact and argument.

After careful consideration of the parties' submissions, the Commission issued a 1975 interim report (349 I. C. C. 411; BOCT A35)[2] finding, among other things, that the Commission had jurisdiction under its car service powers to allocate demurrage receipts as it proposed and that adoption of the rule was warranted in principle. Specifically, it found that car utilization would be improved and that the greater return on the car owner's investment which result from the adoption of the proposed rule would increase the incentive to invest in freight cars and thereby improve car supply. However, the Commission reopened the proceeding at that time to receive further evidence on the feasibility and implementation of specific rules, and to clarify that the proposed rules, if adopted, would also result in remittances to private (non-railroad) car owners. Participants were asked to submit specific information concerning existing as well as new demurrage records that would be required and the additional expenses that would be incurred by implementation of the proposed rule. Guideline questions were provided to aid participants in the presentation of their material. The notice of the second rulemaking proceeding was published in 40 F. R. 18797 (April 30, 1975). While it encouraged participants to focus on enumerated issues, it left the participants free to advance any argument or evidence which they believed might aid the Commission in disposition of the proceeding.

2 BOCT refers to the Appendix filed by petitioners Baltimore and Ohio Chicago Terminal Railroad Co., *et al.*

One hundred eighteen parties, including 101 rail carriers or carrier organizations submitted evidence in initial and/or reply statements on the merits, feasibility and implementation of the rule, with some parties favoring the proposed rule and some opposing it. In an extensive report and order served April 7, 1977, the Commission reaffirmed its conclusion that it had jurisdiction to promulgate the demurrage remittance rule. It concluded that the adoption of the rule proposed in 1975, as slightly amended, would be in the public interest, reasonable and otherwise lawful and would contribute to the maintenance of an adequate freight car supply (353 I. C. C. 567; BOCT A86).

Following petitions for reconsideration, which were denied by the Commission, petitioners Aliquippa and Southern Railroad Company, *et al.*, and petitioners Baltimore and Ohio Chicago Terminal Railroad Company, *et al.*, sought review of the Commission's decision before the U. S. Court of Appeals for the Third Circuit. The cases were consolidated, and on September 6, 1978, the Court of Appeals upheld the Commission's action. Specifically, the Court of Appeals held that the Commission's action was a valid exercise of its authority under former § 1 (6) of the Interstate Commerce Act, which authorized it to promulgate rules and regulations relating to demurrage charges, and that the proposed rule was not arbitrary and capricious under the 5 U. S. C. 706 (2) (A) standard of judicial review applicable to notice and comment rulemaking (BOCT A3).

Further, the Court rejected petitioners' claim that this rule, by including private car owners among the

remittance recipients, permits unlawful rebates to shippers who are private car owners in violation of former § 15 (15) of the Interstate Commerce Act, now 49 U. S. C. 10747, and former § 41 (1) of the Elkins Act, 49 U. S. C. 11903. While the Court did not directly address the petitioners' claim that the Commission should have followed the procedures of former § 15(6)(a) of the Act, 49 U. S. C. 10705, concerning divisions of joint rates, the Court's decision that demurrage charges are not rates in the usual sense disposes of that contention.

—o—

ARGUMENT

I.

The Commission's action was an exercise of its car service and demurrage powers. It did not prescribe divisions of joint rates, and the provisions of Section 15 (6) (a) have no effect on the Commission's action.

The entire "division of revenue" argument of petitioners BOCT, *et al.*, rests on the erroneous premise that the Commission was prescribing divisions of joint rates, rather than exercising car service and demurrage powers in its rulemaking proceeding.

As recently as *I. C. C. v. Oregon Pacific Industries, Inc.*, 420 U. S. 184 (1974), this Court has reaffirmed that demurrage is a "rule" respecting "car service" within the meaning of § 1 (15). This Court stated:

> "We noted in *Allegheny-Ludlum* that § 1 (15) traces back to the Esch Car Service Act of 1917, 40 Stat. 101. 406 U. S., at 744. The use of freight cars as warehouses—the practice which prompted the Commission to act in the present case—was one of the evils at which the original Car Service Act was aimed." *Oregon Pacific Industries* at 188.

Continuing, this Court (*id.* at 190) cited *Iversen v. United States*, 63 F. Supp. 1001, *aff'd per curiam*, 327 U. S. 767 (1945), which concludes demurrage is not a rate within the usual meaning of the word.

The Court of Appeals' decision below, as well as the Commission decision, are in complete accord with the foregoing holdings of this Court. The Court of Appeals relied heavily on *Iversen*, stating at page 691 (BOCT A32):

> "As Judge Prettyman observed in his oft-quoted opinion in *Iversen v. United States:*
>
> > '[D]emurrage charges are in part compensation and in part penalty; . . . in full character they are neither, not being rates as that term is used in connection with rate-making, nor penalties as that term is used in respect to penal impositions. They are *sui generis*. Historically, textually, in purpose and in content, they are an integral part of the established rules and regulations relating to the use and movement of cars. From the beginning they have been sustained as rules and regulations. They could not have been sustained as carrier charges or as penalties.' "

Clearly, then, demurrage charges, rules and regulations relate to car service, and the Commission's power to act on demurrage matters arises under its car service powers.

The Commission did not rely exclusively on former § 1 (6), now 49 U. S. C. 10750, as the petitioners urge. The 1975 interim Commission decision found jurisdiction to impose the demurrage remittance rule under §§ 1 (11), 1 (14) (a), and 1 (15)—the Commission's car service powers (BOCT A40-A41). Later, in its final report and order, the Commission indicated that § 1 (6) added by the Railroad Revitalization and Regulatory Reform

Act of 1976 (4R Act) during the Commission proceedings, further substantiated its jurisdiction to promulgate the proposed rule. The Commission ultimately found, "That the Commission has jurisdiction under section 1 (6) of the act, as amended, *and* under its car service powers to consider the proposed demurrage remittance rule." (BOCT A128, emphasis supplied). Thus, the Commission did not rely on § 1 (6) alone, but rather based its action on both § 1 (6) and the Commission's other car service powers. Obviously, since the Court below held that § 1 (6) provided "the necessary authority to promulgate the demurrage remittance rule," it was not compelled to examine additional statutory bases for the Commission's action (Footnote 17, BOCT A14).

Demurrage charges in no way resemble joint rates, and the Commission was not required to proceed as if it were prescribing divisions of joint rates. The essential feature of a joint rate is that connecting railroads agree on a rate for the carriage of traffic from points on one road to points on another road for an aggregate charge which is less than the sum of their local charges between the same points. *See Chicago, M. St. P. & P. Ry. Co. v. United States,* 366 U. S. 745, 747 (1960). By its very terms, former § 15 (6) (a), now § 10705,[3] defines the Commission's power to prescribe joint classifications, joint rates, division of joint rates, *etc.* It is clear that demurrage rules and charges are not joint rates or charges under former § 15 (6) (a), but rather are in the words of *Iversen, sui generis.* Therefore, the Commission need

3 While a former § 15 (6) (a) referred to prescription of divisions of joint rates and *charges,* the recodification eliminated "charges," apparently as surplusage under the new definitions.

not follow the procedures of former § 15 (6) (a), now § 10705, in promulgating demurrage rules and regulations.

The Fifth Circuit's decision in *Aberdeen & Rockfish R. Co. v. United States,* 565 F. 2d 327 (5th Cir. 1977), is not at odds with the Third Circuit's opinion below. At issue in *Aberdeen & Rockfish* was the propriety of a surcharge one railroad added to its joint freight rates with other railroads and the resulting change in divisions of the joint rates for the movement of traffic. Because demurrage is not a joint rate, *Aberdeen & Rockfish* would not be determinative of any issue in the instant controversy. The BOCT petitioners' attempt to find a conflict between these decisions (p. 9) is unavailing.

II.

The Third Circuit correctly determined that § 17 (14) (b), unlike § 17 (14) (a) which was enacted at the same time, contained no sanction, and moreover, that a court-imposed sanction would not be equitable or consistent with statutory aims.

The Commission in its 1975 interim report approved the proposed remittance rule in principle, but, largely at the urging of the petitioners before this Court, reopened the proceeding for further evidence regarding costs and administrative feasibility. It also reopened to make clear that the proposed rule would provide demurrage remittances not only to railroad owners, but also to private car owners. With these changes, the Commission invited participation from new parties and indicated that leave to intervene would be granted liberally (BOCT A79-A80).[4] New parties did in fact intervene, including the

4 Further contemporaneous discussion of the reopening appears in a Notice of Proposed Further and Amended Rulemaking. 40 F. R. 18797 (April 30, 1975).

private car respondents presently before this Court, Duval Sales Corporation, *et al.*

Subsequently, § 303 (b) of the Railroad Revitalization and Regulatory Reform Act of 1976, P. L. 94-210, 90 Stat. 31, February 5, 1976, amended § 17 of the Interstate Commerce Act by inserting therein a new paragraph (14) with two related but decidedly different provisions, as follows:

> "(14) (a) Any formal investigative proceeding with respect to a common carrier by railroad which is instituted by the Commission after the date of enactment of this subdivision shall be concluded by the Commission with administrative finality within 3 years after the day on which such proceeding is instituted. Any such proceeding which is not so concluded by such date shall automatically be dismissed.
>
> (b) Within one year after the date of enactment of this subdivision, the Commission shall conclude or terminate, with administrative finality, any formal investigative proceeding[5] with respect to a common carrier by railroad which was instituted by the Commission on its own initiative and which has been pending before the Commission for a period of 3 or more years following the date of the order which instituted such proceeding."

Section 17 (14) (a) requires that certain proceedings instituted *after* the 4R Act be concluded within three years, and if not so concluded, "*shall automatically be dismissed.*" (Emphasis supplied.) No such death sentence provision appears in § 17 (14) (b) which was enacted at the same time. Section 17 (14) (b) relates only

5 Respondents herein do not concede that the informal rulemaking in Ex Parte 289 instituted under 5 U. S. C. 553 of the Administrative Procedure Act was a "formal investigative proceeding" or that the 1975 reopening with new issues and new parties did not commence a new proceeding.

to proceedings initiated *before* the 4R Act. The Court below logically concluded: "This distinction in the language of the two sections indicates the desire on the part of Congress not to place ongoing proceedings under the same absolute time limit as proceedings instituted subsequent to the enactment of the 4R Act." (BOCT A30). The practical distinction between the two provisions boils down to a matter of equity and adequate notice for the Commission. With respect to proceedings instituted *after* the 4R Act, the Commission would be on notice from the start that, if too prolonged, they would "automatically be dismissed." However, the Commission could not be expected abruptly to terminate ongoing proceedings like Ex Parte 289 instituted *before* the 4R Act.[6] "Automatic dismissal" cannot be read into § 17 (14) (b) where it has been so clearly omitted.

The Court below further found that, as an equitable matter, injunctive relief barring enforcement of the Commission's order would be inappropriate due to Congressional aims to alleviate the car shortage, the vast resources expended during the course of the proceeding, and the petitioners' total failure to offer any evidence that they had been unduly prejudiced by the 2-month delay encountered by the Commission which merely served to postpone the eventual enforcement of the order petitioners oppose (BOCT A30, including fn. 61).

Under no circumstances would the "one year limitation" deserve review by this Court. The "one year" by

6 Particularly not in this case when the Commission had to issue a notice three weeks after the 4R Act was adopted soliciting written comments regarding what effects the Act's amendment of § 1 (6) (now 49 U. S. C. 10750) had on the proceeding (BOCT A90).

definition is now past and can have no lasting significance to the administration of the Interstate Commerce Act.

III.

The decisions of the Commission and the Court below allow no rebates or other practices in violation of §§ 6 (7), 15 (15), or 41 (1) of Title 49 (now 49 U. S. C. 10761, 10747, and 11903). These decisions are also consistent with one another and with the decisions of this Court.

The petiiioners attempt to create an impression that the Commission and the Court below would somehow allow the railroads to make payments to shippers which would involve unlawful departures from tariff provisions. This position is frivolous. The Commission has repeatedly demonstrated that it will probingly review situations posing a danger of unlawful rebating or concessions under former § 6 (7) (now 49 U. S. C. 10761) or former § 41 (1), the Elkins Act, now 49 U. S. C. 11903. *See, e. g., Adequacy of Freighthouse Rentals Charged,* 344 I. C. C. 157, 167 (1973); *Grain By Rent-A-Train, IFA Territory to Gulf Ports,* 335 I. C. C. 111 (1969); *Ford Motor Co. Terminal Allowance,* 310 I. C. C. 297, 300 (1960); *South Buffalo Ry. Terminal Services,* 287 I. C. C. 195, 230 (1952); *American Smelting and Refining Corp. Terminal Service,* 270 I. C. C. 359 (1948); *A. O. Smith Corp. Terminal Allowance,* 319 I. C. C. 99, 101 (1963); *Forwarder Rates Conditioned Upon Aggregates of Tonnage,* 264 I. C. C. 225, 234 (1945); *Union Tank Car Co. Terminal Service,* 268 I. C. C. 338 (1947); *Propriety of Operating Practices-N. Y. Warehousing,* 216 I. C. C. 291 (1936). It is beyond belief that the Commission, which has been so vigilant in guarding against unlawful rebates would adopt a plan requiring them.

Clearly, the essence of rebating, whether by direct or indirect means, is discrimination or the unequal treatment of shippers which the railroads are obliged to treat equally. Significantly, the BOCT and Aliquippa petitioners did not in the tribunals below ever contend that remittances to private car owners would be unfair or inequitable.

The BOCT petitioners refer to the remittance rule as a "non-tariff remittitur" (p. 13), perhaps suggesting that the remittance rule adopted by the Commission and with which railroads will therefore be required to comply, should be published in tariff form and not just in the *Federal Register,* the *Code of Federal Regulations,* and Commission documents. There is apparently nothing in the Commission's tariff publishing rules which would prevent such tariff publication if it were desirable. 49 C. F. R. Part 1300 (1977). However, there appears to be no need for tariff publication of the remittance rule. Congress over the last 90 years has given the Commission an awe-inspiring array of powers to enforce compliance with its rules.

The BOCT petition (p. 12) seems to imply that remittance of demurrage charges would result in the carrier's failure to collect the full amount of demurrage charges from the shipper or receiver of freight. But on the contrary, the full amount of demurrage charges would be collected under the remittance rule. The rule specifically provides in pertinent part:

> "(a) Except as otherwise provided hereinafter, the nonowning railroad, on whose lines the car is being detained under demurrage, shall *remit* to the

freight car owner, all demurrage charges *collected*[7] in excess of $10 per car per day." (BOCT A127; emphasis supplied).

The Commission succinctly answered rebate arguments in its final report:

> "For those who argue that the remittance would be an unlawful rebate, we reiterate our position stated in the interim report (349 I. C. C. 411, 438), that rebates are not involved because the delivering carrier will receive its full rate and compensation for all demurrage charges and will merely remit the excess to the car owner." (BOCT A125).

The remittance rule creates a three-part transaction. First, the shipper pays the full amount of the demurrage to the railroad. Second, the railroad retains a portion of the demurrage which is at least equal to its demurrage-related expenses. Third, the railroad acts as a conduit by passing the remainder of the demurrage received from the shipper to a car owner which may be a railroad, a shipper, or a non-shipper, and which will by virtue of the remittance have an increased incentive to acquire cars.

7 Naturally, the nonowning railroad has an obligation to collect all demurrage charges which accrue; any failure to collect those charges would not relieve it of the obligation to remit the amount in excess of $10 to the freight car owner. The Commission stated in its final report, ". . . [W]e note that a carrier is under a legal obligation to collect demurrage charges properly assessed, and the implementation of this rule does not relieve a carrier of this duty." (BOCT A124). Indeed, the Commission's remittance plan is designed in part to prevent recurrence of past carrier failures to collect demurrage charges. The Commission stated in its 1975 interim report:

> "When carriers do not actually collect demurrage charges, an important economic incentive for shippers to release cars with dispatch is lost. Under the proposal herein, the car owner would receive part of those demurrage payments. Faced with the necessity of paying these sums to the car owner, the delivering carrier would have added motivation to pursue the charges again the shippers and receivers. The incentive to release cars would be greater and some improvement in car utilization could reasonably be expected." (BOCT A69).

The Aliquippa petition (see p. 2) urges that certiorari should be granted, reasoning that the Court below sustained the determination of the Commission on the rebating question based upon a rationale not invoked by the Commission itself. The decision of the Court below is not at odds with that of the Commission. The Commission considered the rebate argument, rejected it, and sustained the demurrage rule. Likewise, the Court below considered the rebate argument, rejected it, and sustained the demurrage remittance rule. Further, these tribunals engaged in similar reasoning. The Commission primarily emphasized that the delivering carrier would collect its full charge and be fully compensated (BOCT A125). The Court below primarily focused on remittance from the demurrage charges. It determined that a demurrage remittance fit neither within § 15 (15) nor § 41 (1).[8] Demurrage was unique, *sui generis:*

8 Just as remittances cannot be classified as rebates, neither can they be regarded as allowances under former § 15(15) (49 U. S. C. 10747). An allowance essentially is nothing more than a "reverse rate"—compensation paid by a railroad to a shipper, rather than vice-versa. As earlier noted, *Iversen v. United States,* 63 F. Supp. 1001 (D. C. D. C. 1946), *aff'd per curiam* 327 U. S. 767 (1946), clearly indicated that demurrage is *"sui generis"* and not a rate in the usual sense. Demurrage remittances distinctly differ from allowances in that the remittances involve a penalty element which allowances do not. Precisely owing to this penalty element, the

(Continued on next page)

". . . [D]*emurrage remittance* relates not to rail carriers' property, but to excessive delay caused by the shipper or receiver in the loading or unloading of freight cars. Furthermore, it [demurrage remittance] is neither a 'charge and allowance' paid by the railroads for the use of freight cars nor a reduction of the railroads' rates for owner-shippers. Rather, demurrage is a cost imposed upon the receiver, the penalty portion of which will be transmitted to the owner by the delivering carrier." (BOCT A32, emphasis supplied).

The reliance of petitioners Aliquippa, *et al.*, (pp. 8-9) on *SEC v. Chenery Corp.*, 332 U. S. 194, 196 (1947), is badly misplaced. *Chenery* involved a situation in which

---

(Continued from previous page)

Commission has long emphasized that demurrage charges are not to be regarded as a source of carrier revenue or equated with freight rates. *Demurrage Rules and Charges, Nationwide,* 340 I. C. C. 83, 87 (1971), *aff'd sub nom, General Mills v. United States,* 364 F. Supp. 1278 (D. Minn. 1973); *Increased Demurrage Charges, 1956,* 300 I. C. C. 577, 585 (1957); *Utah Gilsonite Co. v. A. T. & S. F. Ry. Co.,* 96 I. C. C. 653, 673 (1925); and *Kidston & Co. v. D., L. & W. R. Co.,* 74 I. C. C. 135, 139 (1922). Demurrage remittances also distinctly differ from allowances in that remittances essentially involve a payment from shipper funds to a car owner, with the railroad merely acting as a conduit; allowances on the other hand involve a payment from railroad funds to a shipper. Finally, as shown in Section I of the Argument above, demurrage remittances spring from the Commission's exercise of its car service powers as well as former § 1(6) (now 49 U. S. C. 10750) which requires that the Commission

"establish rules related to those [demurrage] charges, in a way that fulfills the national needs related to—

(1) Freight car use and distribution; and

(2) Maintenance of an adequate supply of freight cars to be available for transportation of property."

a reviewing court *rejected* an agency's rationale for an order and could not substitute its own findings in an area of agency discretion, policy or judgment for those of the agency. The instant situation is markedly different. The Third Circuit did not reject the Commission's findings on the rebate issue or challenge their adequacy. Neither did that Court attempt to substitute its findings for the Commission's. Furthermore, the Court below in handling the rebate matter was not dealing with "a determination or judgment, which an administrative agency alone is authorized to make . . ." such as that involved in the *Chenery* cited by the Aliquippa petitioners. (332 U. S. at 196; Aliquippa pp. 8-9).[9]

---

9 This Court has approved the use of a different rationale by a reviewing court than that used by an agency. In *Milk Transport, Inc. v. Interstate Commission,* 190 F. Supp. 350, 354 (D. Minn. 1960), *aff'd per curiam,* 368 U. S. 5 (1961), the Commission dismissed applications for certificates of public convenience and necessity *solely* because citrus juices were not "exempt" commodities *prior* to the Tranportation Act of 1958. Although the applicant argued that the *Chenery* decisions blocked the court from upholding the Commission's decision on grounds other than those specified in its order (*id.* at 354), that is precisely what the Court did. It held that the applicant was not entitled to a certificate because the transportation of citrus juices was not afforded "grandfather rights" by the 1958 Act. The Court distinguished the *Chenery* cases:

"The first Chenery case did hold that a reviewing court must judge an agency order only on the grounds on which the order was based, but the court limited this rule to determinations which the administrative agency alone is authorized to make. (*Id.* at 354).

* * *

"We are not concerned here with a judgment which only the Interstate Commerce Commission can make. . . . We are interpreting the scope of a federal statute and this task is not peculiar to an administrative agency." (*Id.* at 355.)

The main discussion of the *Chenery* issue appears in an earlier decision of this Court, *SEC v. Chenery Corp.*, 318 U. S. 80 (1943). The thrust of that decision was there stated as follows by this Court:

> "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. . . . [A]n appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." 318 U. S. at 88.

Determining whether remittances are rebates is not one which is in the exclusive domain of the Commission. Under the Elkins Act, including former § 41(1), the Federal courts are empowered to decide cases involving unlawful rebates and discriminations. In fact, former § 41 (1) (now 49 U. S. C. 11903) makes transportation "(1) at less than the rate in effect under Chapter 107 of this Title, or (2) by practicing discrimination . . ." subject to criminal sanctions (BOCT A146). Since both former § 6(7) (now 49 U. S. C. 10761) and former § 15(15) (now 49 U. S. C. 10747) fall within Chapter 107 of Title 49, both the Court below as well as the Commission have substantial expertise in these areas. The interpretations reached by them are consistent with each other and the decisions of this Court.

———o———

CONCLUSION

The petitions in Nos. 78-1049 and 78-1069 disclose no valid reasons why this Court should engage in an exercise of its supervisory powers. Those petitions should be denied.

Respectfully submitted,

CURTIS H. BERG
WILLIAM R. POWER
176 East Fifth Street
St. Paul, Minnesota 55101

WILLIAM PAUL HIGGINS
WILLIAM DONALD BOE, JR.
1416 Dodge Street
Omaha, Nebraska 68179

Attorneys for Respondents

Dated: February 1979